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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 STANLEY MCQUERY,
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12 Plaintiff,
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14 v.
15 CITY OF SAN DIEGO, *et al.*,
16 Defendants.
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Case No. 16-cv-170-BAS(BGS)

ORDER:

- (1) **DENYING PLAINTIFF'S
REQUEST FOR EVIDENCE
AND APPOINTMENT OF
COUNSEL;**
- (2) **APPROVING AND
ADOPTING REPORT AND
RECOMMENDATION IN ITS
ENTIRETY;**
- (3) **GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; AND**
- (4) **DENYING DEFENDANTS'
MOTION TO DISMISS AS
MOOT**

[ECF Nos. 18, 23, 25, 29]

23 **I. BACKGROUND**

24 **A. Procedural History**

25 Plaintiff Stanley McQuery filed this Complaint on January 22, 2016. (ECF No.
26 1.) On May 10, 2016, the Court issued a Scheduling Order. (ECF No. 10.) Among
27 other dates, the Court ordered that discovery be completed by September 12, 2016.
28 (Scheduling Order ¶ 5, ECF No. 10.) Mr. McQuery did not make any discovery

1 requests of Defendants, and he failed to respond to discovery requested by the
2 Defendants. (*See* Scott Decl. ¶¶ 3-5, 7-8, Ex. F, ECF No. 18-3.)

3 On January 9, 2017, Defendants filed a Motion for Summary Judgment. (ECF
4 No. 18.) The Court served Mr. McQuery with a notice pursuant to *Klinge v.*
5 *Eikenberry*, 849 F.2d 409 (9th Cir. 1988), ordering him to respond to the Motion for
6 Summary Judgment by March 9, 2017, and explaining to him that if he did not
7 respond, his case could be dismissed in its entirety. (ECF No. 19.) Mr. McQuery
8 failed to respond.

9 On April 25, 2017, Defendants filed a Motion to Dismiss for lack of
10 prosecution. (ECF No. 23.) By this date, pretrial deadlines had passed, and Mr.
11 McQuery had done nothing to proceed with his case. In light of these pending
12 motions, on May 2, 2017, the Court vacated the remaining pretrial and trial dates
13 pending the outcome of the motions. (ECF No. 24.)

14 The Magistrate Judge has now issued a Report and Recommendation (“R&R”)
15 recommending that this Court grant the Motion for Summary Judgment and Deny
16 the Motion to Dismiss for lack of prosecution as moot. (ECF No. 25.) The R&R
17 ordered that any Objections to the R&R be filed by May 19, 2017. (*Id.*) The Court
18 directed that any Objections be captioned “Objections to Report and
19 Recommendation.” (*Id.*)

20 On May 16, 2017, Mr. McQuery filed a document titled “Order Vacating
21 Pretrial Dates, Hearings and Trial” in which he states: (1) he is asking the Court to
22 order certain items; (2) his change of address was not followed; and (3) he is
23 requesting a lawyer. (ECF No. 27.) On May 19, 2017, Mr. McQuery filed a document
24 titled “Reject the Motion for Defendants” in which he again requests additional
25 documents in discovery and asks for counsel. (ECF No. 29.) Finally, on June 2, 2017,
26 Mr. McQuery filed a document titled “Opposition to Motion Nunc Pro Tunc” in
27 which he states he is “opposing all motions the Defendants are trying to get the courts
28 to grant.” (ECF No. 31.)

1 **B. Mr. McQuery’s Address Change**

2 When Mr. McQuery filed his Complaint, he was housed at George Bailey
3 Detention Facility. (ECF No. 1.) On March 23, 2016, the Court received notice, from
4 the Watch Commander at George Bailey, that Mr. McQuery had moved to the
5 California Institute for Men in Chino on February 18, 2016. (ECF No. 6.) Therefore,
6 the Court reissued the IFP package, updated Mr. McQuery’s address, and resent the
7 Court’s Order. (ECF No. 7.) Mr. McQuery apparently received this package because,
8 on April 19, 2016, he filed the executed Summons sent to him at the California
9 Institute for Men. (ECF No. 8.)

10 On July 15, 2016, Mr. McQuery sent the Court a letter indicating that he had
11 been moved to California Men’s Colony in San Luis Obispo. (ECF No. 12.) On
12 September 23, 2016, he filed a notice confirming this address change. (ECF No. 14.)
13 All motions at issue in this case—including the Motion for Summary Judgment, the
14 Motion to Dismiss, and the R&R—were sent to Mr. McQuery at the California Men’s
15 Colony, where he apparently remains today.

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17 **II. ANALYSIS**

18 **A. Appointment of Counsel**

19 “[T]here is no constitutional right to appointed counsel for § 1983 claims.”
20 *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); *see also Hedges v.*
21 *Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994) (“[T]here is no absolute
22 right to counsel in civil proceedings.”) (citations omitted).

23 District courts may request that an attorney represent an indigent civil litigant
24 upon a showing of “exceptional circumstances.” *See Agyeman v. Corr. Corp. of Am.*,
25 390 F.3d 1101, 1103 (9th Cir. 2004). “A finding of exceptional circumstances . . .
26 requires at least an evaluation of the likelihood of the plaintiff’s success on the merits
27 and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the
28 complexity of the legal issues involved.’” *Id.* (quoting *Wilborn v. Escalderon*, 789

1 F.2d 1328, 1331 (9th Cir. 1986)).

2 In this case, neither exceptional circumstances nor interests of justice warrant
3 appointment of counsel. As discussed in the R&R, Mr. McQuery's likelihood of
4 success on the merits is low. Furthermore, although he has failed to make much of
5 an effort to pursue this lawsuit, Mr. McQuery has shown himself able to respond and
6 articulate his position, when he chooses to do so. The facts are not complicated and
7 the case does not involve complex legal issues. Therefore, to the extent Mr. McQuery
8 is requesting appointment of counsel, that request is **DENIED**. (ECF No. 29.)

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10 **B. Amendment of Scheduling Order To Allow Discovery**

11 In what appears to be his Oppositions to the R&R, Mr. McQuery requests that
12 both the Court and Defendants produce numerous items of discovery. In its Pretrial
13 Scheduling Order, the Court ordered that all discovery be completed by September
14 12, 2016. (Scheduling Order ¶ 5.) Therefore, the Court will construe Mr. McQuery's
15 requests for discovery as a motion to amend the scheduling order to allow him to
16 conduct discovery.

17 Pursuant to Rule 16(b)(4), a Court's scheduling order may be modified "only
18 for good cause." "Good cause" focuses primarily on the diligence of the individual
19 seeking the modification. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609
20 (9th Cir. 1992). The Court should look at the "party's reasons for seeking
21 modification If that party was not diligent, the inquiry should end." *Id.* Further,
22 a party seeking a continuance to pursue further discovery must "proffer sufficient
23 facts to show that the evidence sought exists . . . and that it would prevent summary
24 judgment." *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1990).

25 In this case, Mr. McQuery has neither demonstrated diligence nor facts to show
26 that the requested discovery would prevent summary judgment. Mr. McQuery has
27 not responded to any of Defendants' discovery requests. He failed to respond to
28 Defendants' Motion for Summary Judgment, filed six months ago. He failed to

1 respond to the Defendants’ Motion to Dismiss. In fact, he failed to do anything to
2 move the case forward since it was filed eighteen months ago. He fails to indicate
3 why he is now, almost eight months after the discovery deadline, requesting more
4 time to pursue discovery.

5 Furthermore, many of the items Mr. McQuery seeks—his medical records
6 from the hospitals where he was treated, and his criminal records—are documents he
7 can obtain without the assistance of the Court or Defendants. There is no evidence
8 that the body-cam footage he requests exists. Finally, some of his requests, for
9 example, “all evidence the defendants have on the investigation of the K-9 officers”
10 are vague. Mr. McQuery fails to show how any of these items would assist him in his
11 response to the Motion for Summary Judgment.

12 Therefore, to the extent Mr. McQuery’s Request for Evidence is requesting
13 that the scheduling order be modified so he can now pursue discovery, that request
14 is **DENIED**. (ECF No. 29.)

15 16 **C. Motion for Summary Judgment**

17 The Court reviews *de novo* those portions of the R&R to which objections are
18 made. 28 U.S.C. § 636(b)(1). The Court may “accept, reject, or modify, in whole or
19 in part, the findings or recommendations made by the magistrate judge.” *Id.* But
20 “[t]he statute makes it clear that the district judge must review the magistrate judge’s
21 findings and recommendations *de novo if objection is made*, but not otherwise.”
22 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc)
23 (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226
24 (D. Ariz. 2003) (concluding that where no objections were filed, the district court had
25 no obligation to review the magistrate judge’s report). “Neither the Constitution nor
26 the statute requires a district judge to review, *de novo*, findings and recommendations
27 that the parties themselves accept as correct.” *Id.* “When no objections are filed, the
28 *de novo* review is waived.” *Marshall v. Astrue*, No. 08cv1735, 2010 WL 841252, at

*1 (S.D. Cal. Mar. 10, 2010) (Lorenz, J.) (adopting report in its entirety without review because neither party filed objections to the report despite the opportunity to do so). This rule of law is well-established in the Ninth Circuit and this district. *See Wang v. Masaitis*, 416 F.3d 992, 1000, n. 13 (9th Cir. 2005) (“Of course, de novo review of a R & R is only required when an objection is made to the R & R.”); *Nelson v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting report in its entirety without review because neither party filed objections to the report despite the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157 (S.D. Cal. 2004) (Benitez, J.).

Objections must be written and specific. *See, e.g.*, Fed. R. Civ. P. 72(b)(2) (“[A] party may serve and file *specific* written objections to the proposed findings and recommendations” of the magistrate judge) (emphasis added). “Numerous courts have held that a general objection to the entirety of a Magistrate Judge’s [R&R] has the same effect as a failure to object.” *Alcantara v. McEwen*, No. 12-cv-401-IEG(DHB), 2013 WL 4517861 at *1 (S.D. Cal. Aug. 15, 2013) (citing cases). In the absence of specific objections, the clear weight of authority indicates that the court need only satisfy itself that there is no “clear error” on the face of the record before adopting the magistrate judge’s recommendation. *See, e.g.*, Fed. R. Civ. P. 72(b) Advisory Comm. Notes (1983) (citing *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974)).

Mr. McQuery generally objects to “all motions the Defendants are trying to get the courts to grant.”¹ (ECF No. 31.) This is insufficient and the Court could simply review the R&R for clear error. However, the Court has reviewed the Magistrate

¹ To the extent Mr. McQuery objects that “[t]he address was not followed” and his mail was not rerouted (ECF No. 27), Mr. McQuery provides no evidence to support this claim. In fact, the evidence was that he was moved in 2016, well before the Motion for Summary Judgment was filed. Mr. McQuery was able to respond immediately when the R&R was served at California Men’s Colony in San Luis Obispo, the same address where the Motion for Summary Judgment and *Klinge* notice were sent. Therefore, to the extent Mr. McQuery opposes the R&R because of an address change, this claim is not supported by the evidence.

1 Judge's decision *de novo* and finds that both the factual and legal underpinnings of
2 the R&R are sound.

3 With respect to the Excessive Force claim and Qualified Immunity analysis,
4 this Court adds that, even if the force used by the officers was excessive, the officers
5 reasonably believed, based on all the facts of the arrest, that Mr. McQuery would not
6 surrender and posed a risk to the officers or others. Therefore, even if there was a
7 constitutional violation, this Court finds the right at issue was not "clearly
8 established" and the officers are still entitled to qualified immunity. *See Pearson v.*
9 *Callahan*, 555 U.S. 223, 232 (2009) (qualified immunity is a two-prong analysis: if
10 the Court determines the officers violated a constitutional right, the Court must
11 additionally decide whether the right at issue was "clearly established" at the time of
12 the defendants' alleged misconduct).


14 **III. CONCLUSION & ORDER**

15 Having reviewed the Magistrate Judge's R&R *de novo*, the Court concludes
16 the reasoning is sound and thus **ADOPTS** it in its entirety. (ECF No. 25.) The Court
17 **DENIES** Plaintiff's Request for Evidence and Appointment of Counsel (ECF No.
18 29), **GRANTS** Defendants' Motion for Summary Judgment (ECF No. 18), and
19 **DENIES AS MOOT** Defendants' Motion to Dismiss for Lack of Prosecution (ECF
20 No. 25.)

21 The Clerk of the Court is directed to enter judgment in favor of Defendants.

22 **IT IS SO ORDERED.**

24 **DATED: June 9, 2017**

25 
26 **Hon. Cynthia Bashant**
27 **United States District Judge**